Filed 2/7/19 P. v. Moffett CA1/5
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ANDREW LAWRENCE MOFFETT,** **Defendant and Appellant.**	**A143724** **(Contra Costa County Super. Ct. No. 050513788)**

At an October 2014 resentencing hearing, the trial court sentenced Andrew Lawrence Moffett to life imprisonment without the possibility of parole (LWOP) plus 23 years, for crimes Moffett committed when he was almost 18 years old. Moffett appealed. In 2016, we directed the court to modify the sentencing minute order and abstract of judgment, but otherwise affirmed. The California Supreme Court granted review, then transferred the case to this court to determine whether the matter is moot in light of Senate Bill No. 394 (2017–2018 Reg. Sess) (Pen. Code, § 3051, subd. (b)(4)).[1]

[1] We vacated our 2016 opinion and received supplemental briefing on Senate Bill No. 394, and on Proposition 57 and Senate Bill No. 620 (2017–2018 Reg. Sess.). Undesignated statutory references are to the Penal Code. We incorporate by reference the opinions in Moffett's prior appeals, including *People v. Moffett* (Nov. 9, 2010, A122763 [nonpub. opn.]) and *People v. Gutierrez* (2014) 58 Cal.4th 1354.

We conclude Senate Bill No. 394 moots Moffett's challenge to his LWOP sentence, but that he is entitled to a juvenile transfer hearing, at which the court must exercise its discretion under section 12022.53, subdivision (h). Accordingly, we conditionally reverse and remand for the court to hold a transfer hearing and to resentence Moffett.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005—four days before turning 18—Moffett committed an armed robbery, during which his accomplice shot and killed a police officer. A jury convicted Moffett of special circumstance first degree murder, three counts of second degree robbery, and driving a stolen vehicle. The jury found true firearm use allegations for the murder and robbery counts (§ 12022.53, subd. (b)). In 2008, the trial court sentenced Moffett to LWOP, plus an additional 24 years on the remaining charges and enhancements. Moffett appealed. In 2010, we reversed the peace officer special circumstance for insufficient evidence of intent to kill and remanded for resentencing. On remand, the court sentenced Moffett to LWOP plus 24 years.

Moffett appealed. In 2012, we remanded for resentencing pursuant to the constitutional standards announced in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*). The California Supreme Court granted Moffett's petition for review, consolidated his case with a companion case, and remanded "for resentencing in light of the principles set forth in *Miller* and this opinion." (*People v. Gutierrez*, *supra,* 58 Cal.4th at p. 1361.) At an October 2014 resentencing hearing, the trial court considered the factors outlined in *Miller* and *Gutierrez* (collectively, *Miller* factors). It imposed LWOP plus an additional 23 years which, as relevant here, consisted of two consecutive 10-year prison terms on the firearm use enhancements (§ 12022.53, subd. (b)).

In a lengthy explanation of its reasoning for imposing the LWOP term, the court found—among other things—that Moffett's actions "were not those of an irresponsible or impulsive child, nor were they the product of peer pressure or coercion by others or surprise. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victims in this case." The court found Moffett

was not "irrational, immature, or childlike" and that he was not a "juvenile offender whose crime reflects unfortunate yet transient immaturity. Mr. Moffett's juvenile history coupled with his behavior and actions while in custody, before, during and after the trial, along with the facts and circumstances of the crimes themselves, cannot support a finding of immaturity. Quite the contrary. [¶] This Court does not find that there is a realistic chance of rehabilitation in this case."

Moffett appealed. He argued the court erred by imposing LWOP after considering the *Miller* factors, and that his sentence violated the constitutional prohibition on cruel and unusual punishment. In 2016, we modified the sentencing minute order and abstract of judgment. In all other respects, we affirmed. The California Supreme Court granted review (Mar. 15, 2017, S239323) and deferred further action pending consideration and disposition of a related issue in *People v. Padilla* (2016) 4 Cal.App.5th 656. After it dismissed *Padilla* as moot in light of Senate Bill No. 394, the California Supreme Court transferred this case to this court, directing us to consider whether the matter is moot in light of Senate Bill No. 394.

DISCUSSION

I.

Moffett's Challenge to His LWOP Sentence is Moot

Before the passage of Senate Bill No. 394, Moffett was not eligible for a parole suitability hearing. Senate Bill No. 394 changed that. It amended section 3051 by adding subdivision (b)(4), which provides juvenile LWOP defendants with parole eligibility during their 25th year of incarceration. (See *People v. Lozano* (2017) 16 Cal.App.5th 1286, 1289.) A "sentence that includes a meaningful opportunity for release during [a defendant's] 25th year of incarceration" "is neither LWOP nor its functional equivalent." (*People v. Franklin* (2016) 63 Cal.4th 261, 280 (*Franklin*).) Under Senate Bill No. 394, Moffett "is now eligible for a parole suitability hearing during [his] 25th year of incarceration," which moots his challenge to his LWOP sentence. (*Lozano*, at pp. 1290, 1289.) Moffett's claims to the contrary are not persuasive. For example, he argues the LWOP issue is not moot because (1) his sentence should be reduced to second degree

murder under *People v. Dillon* (1983) 34 Cal.3d 441; (2) LWOP for felony murder is unconstitutional; and (3) the trial court abused its discretion by resentencing him to LWOP. These arguments—which we rejected in our prior opinion—have little bearing on the mootness issue because Moffett is no longer facing an LWOP term.

Moffett also contends the "matter is not moot . . . absent a *Franklin* remand." In *Franklin*, the defendant was sentenced before the United States Supreme Court decided *Miller*. As a result, it was "not clear" the defendant had received an opportunity to present evidence "relevant at a youth offender parole hearing," i.e., "youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." (*Franklin, supra,* 63 Cal.App.4th at pp. 269, 284.) The California Supreme Court remanded for the "limited purpose of determining whether [the defendant] was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations." (*Id.* at pp. 286–287.)[2]

At the October 2014 resentencing hearing, Moffett had the opportunity to develop a record to be used at a future youth offender parole hearing. The probation officer's report analyzed the *Miller* factors; the parties' sentencing briefs discussed those factors. Moffett offered a report prepared by a psychiatrist, who discussed the *Miller* factors pertaining to Moffett. At the resentencing hearing, Moffett's father made a statement, and Moffett presented evidence—including his testimony and the psychiatrist's testimony—relevant to the "youthful offender" issue, including his cognitive ability, emotional maturity, family history and upbringing, and his growth while incarcerated. The court organized its reasoning for resentencing Moffett to LWOP according to these factors, including Moffett's "chronological age and its hallmark features" and his "family

[2] "The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' " (*Franklin, supra,* 63 Cal.App.4th at p. 284.)

and home environment." (*Miller, supra,* 567 U.S. at p. 477.) Moffett does not point to anything more he would present to the court if given the opportunity.

On this record, we conclude Moffett had an adequate opportunity to develop the factors related to his youth that will inform the Board of Parole Hearing's decision. The requisites of *Franklin* have been satisfied, and no remand for that purpose is warranted. (See *People v. Cornejo* (2016) 3 Cal.App.5th 36, 68–69 [remand unnecessary where defendants were sentenced after *Miller* and they had opportunity to make a record of their characteristics and circumstances in the form of sentencing memoranda and character reference letters]; see also *People v. Phung* (2018) 25 Cal.App.5th 741, 759 (*Phung*) [defendant sentenced before *Franklin* received "individualized sentencing" contemplated by *Franklin*; the "trial judge, . . . expressly considered 'defendant's youth,' 'the atten[dant] circumstances' in this case, . . . 'a juvenile's greater capacity for change,' and defendant's criminal history (which started 'at age 13')"].)

II.

Moffett is Entitled to a Juvenile Transfer Hearing

In November 2016, while Moffett's appeal was pending, "Proposition 57 . . . became effective. Among other provisions, Proposition 57 amended the Welfare and Institutions Code . . . to eliminate direct filing by prosecutors. Certain categories of minors—which would include [Moffett]—can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated." (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1103 (*Vela*); see also *Phung, supra,* 25 Cal.App.5th at p. 762.) Moffett argues—and the Attorney General agrees—his case should be remanded for a juvenile transfer hearing pursuant to Proposition 57. (See *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 309–310; *Vela,* at pp. 1113–1114.)

We accept the Attorney General's concession. Moffett's "conviction and sentence are conditionally reversed and we order the juvenile court to conduct a juvenile transfer

hearing. [Citation.] When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [Moffett]'s cause to a court of criminal jurisdiction. [Citation.] If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [Moffett] to a court of criminal jurisdiction because he is 'not a fit and proper subject to be dealt with under the juvenile court law,' then [Moffett's] convictions are to be reinstated. [Citation.] The court is to resentence [Moffett] consistent within the bounds of its discretion as discussed within the following section of this opinion. On the other hand, if the juvenile court finds that it would *not* have transferred [Moffett] to a court of criminal jurisdiction, then it shall treat [his] convictions as juvenile adjudications and impose an appropriate 'disposition' within its discretion." (*Vela, supra,* 21 Cal.App.5th at p. 1113.)

III.

Limited Remand for the Court to Exercise Discretion Under Section 12022.53, Subdivision (h)

At the October 2014 resentencing hearing, the court imposed two consecutive 10-year prison terms on the firearm use allegations (§ 12022.53, subd. (b)). When Moffett was resentenced, the court had no discretion to strike these firearm enhancements. Effective January 1, 2018, the trial court has discretion to strike or dismiss these enhancements in the interest of justice. (See *Phung, supra,* 25 Cal.App.5th at p. 763; § 12022.53, subd. (h).)

Moffett argues his case should be remanded to permit the court to exercise its discretion under section 12022.53, subdivision (h). The Attorney General argues "it would be an 'idle act' . . . for the sentencing court to reconsider imposition of the firearm enhancements." We disagree. The court's comments at the resentencing hearing illuminate the court's consideration of the *Miller* factors in the context of its decision to impose the LWOP term. The court's comments shed no light on whether the court would have exercised its discretion to strike the firearm enhancements.

It is undisputed that the court had no discretion, when Moffett was resentenced in October 2014, to strike the firearm use enhancements. The subsequently enacted section 12022.53, subdivision (h) provided the court with that discretion, greatly modifying the court's sentencing authority. Thus, even with the court's statements during resentencing, we cannot be certain the court would not have exercised its new discretion to strike the firearm enhancements. In an abundance of caution, we remand this matter for resentencing to allow the court to consider whether Moffett's firearm enhancements should be stricken under section 12022.53, subdivision (h). (*People v. Johnson* (Feb. 5, 2019, No. D071011) __ Cal.App.5th __ [2019 D.A.R. 1111]; see also *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)[3] We express no opinion on how the court should exercise that discretion on remand. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 428.)

DISPOSITION

"The judgment is conditionally reversed. The cause is remanded with instructions that it be transferred to the juvenile court to conduct a transfer hearing no later than 90 days from the filing of the remittitur. [¶] If, at the transfer hearing, the juvenile court determines that it would have transferred defendant to a court of criminal jurisdiction, then the matter shall be transferred to the criminal court and defendant's conviction is to be reinstated. The court shall then resentence [Moffett] and must exercise its discretion under [section 12022.53, subdivision (h)]. [¶] If, at the transfer hearing, the juvenile court determines that it would not have transferred [Moffett] to a court of criminal jurisdiction, then [Moffett's] criminal convictions and enhancements will be deemed

[3] *People v. McVey* (2018) 24 Cal.App.5th 405—not cited by the Attorney General—is distinguishable. The *McVey* court held remand would be futile where the trial court "identified several aggravating factors" that "far outweighed any mitigating factors," and noted " 'the high term of 10 years on the enhancement [was] the only appropriate sentence[.]' " (*Id.* at p. 419.) Here and in contrast to *McVey*, the court made no remarks regarding the firearm enhancements. As a result, the record does not "clearly indicate" the trial court would not have exercised its discretion to strike the firearm enhancements had it known it had that discretion. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

juvenile adjudications as of the date of the verdict. The juvenile court shall exercise its discretion pursuant to [section 12022.53, subdivision (h)] in deciding whether to strike the firearm enhancements. The juvenile court is then to conduct a dispositional hearing within its usual timeframe." (*Phung, supra,* 25 Cal.App.5th at p. 763; *Vela, supra,* 21 Cal.App.5th at pp. 1114–1115.)

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.

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